89-877 (1)

Supreme Court, U.S.
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DEC 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1989

LEDURA WATKINS,

Petitioner,

-vs-

DALE FOLTZ,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
COURT OF APPEALS NO. 88-1739

– AND APPENDIX –

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QUESTIONS PRESENTED

I

WHEN A *PRO SE* PETITIONER FOR A WRIT OF HABEAS CORPUS NEVER APPEARS IN COURT AND THE PETITION IS DECIDED AND DENIED ON THE PLEADINGS FILED, SHOULD THE DISTRICT COURT BE REQUIRED TO INFORM THE PETITIONER BY A SEPARATE DOCUMENT ACCOMPANYING THE ORDER DENYING THE PETITION THAT PETITIONER HAS A RIGHT TO APPEAL THE DENIAL AND THAT HE MUST FILE HIS NOTICE OF APPEAL WITHIN 30 DAYS?

II

SINCE PETITIONER NEVER APPEARED IN THE DISTRICT COURT IN CONNECTION WITH HIS PETITION FOR A WRIT OF HABEAS CORPUS AND SINCE HE DID NOT KNOW THAT HE HAD A RIGHT TO APPEAL FROM THE DENIAL OF HIS PETITION AND SINCE THE DISTRICT COURT DID NOT INFORM HIM OF HIS RIGHT TO APPEAL AND SINCE PETITIONER DID NOT APPEAL AND THE TIME FOR APPEAL HAS LONG SINCE RUN, SHOULD THE DISTRICT COURT BE REQUIRED TO RECALL ITS JUDGMENT DENYING THE PETITION FOR A WRIT OF HABEAS CORPUS AND THEN ENTER THE SAME JUDGMENT SO THAT PETITIONER MAY HAVE 30 DAYS IN WHICH TO APPEAL?

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PETITION FOR A WRIT OF CERTIORARI
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COURT OF APPEALS NO. 88-1739

Ledura Watkins, petitioner, by his attorney, Carl Ziemba, respectfully prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Sixth Circuit bearing date July 27, 1989. Petitioner's motion for rehearing and suggestion for rehearing en banc was denied by Order dated October 4, 1989.

OPINION AND ORDERS BELOW

The Order dated July 27, 1989 has not been published. A copy of this Order is included in the appendix, *infra*. A copy of the Order dated October 4, 1989 denying rehearing is also included in the appendix, *infra*. The Order dated June 30, 1988 of the district court to which reference is made in the Court of Appeals Order of July 27, 1989 is also included in the appendix, *infra*.

STATUTE INVOLVED

28 USC 1651:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF JURISDICTION

The United States Court of Appeals entered its final Order in the case at bench on July 27, 1989. Petitioner's motion for rehearing was denied by Order dated October 4, 1989. The jurisdiction of this Court is invoked under 28 USC 1254.

STATEMENT OF THE CASE

Petitioner was convicted by jury of murder of the first degree and sentenced to life in prison with no hope of parole in Case No. 75-18084 in Recorder's Court for the City of Detroit, Michigan. He appealed his conviction as a matter of right to the Michigan Court of Appeals and his conviction was affirmed by that court; and petitioner subsequently exhausted all of his state appellate remedies. Petitioner's conviction occurred in 1976; his final state appellate remedy was exhausted in 1983.

Petitioner, proceeding *pro se*, filed a petition for a writ of habeas corpus on April 22, 1986 in the United States District Court for the Eastern District of

Michigan, Southern Division, Civil Action No 86CV-40192-FL. The district court judge, the Honorable Stewart Newblatt, by Order dated November 21, 1986 denied the petition and petitioner's motion for the appointment of counsel; and under date November 21, 1986, the district court entered a Judgment denying the petition for a writ of habeas corpus .

Petitioner did not file an appeal from the said judgment, and nothing further was done by petitioner or on his behalf until May 3, 1988 when petitioner's mother, who had been saving her money in order to hire a lawyer for petitioner, consulted with Carl Ziemba, attorney herein, in his offices and retained him to seek some kind of relief for petitioner from his plight. On May 5, 1988, said Carl Ziemba consulted with petitioner at State Prison for Southern Michigan at Jackson, Michigan, and asked petitioner why he did not appeal from the Judgment denying his petition for a writ of habeas corpus . Petitioner answered that that was the first that he realized or was informed that he had had a right to appeal from the said judgment.

With the case in this posture, petitioner, with retained counsel, filed on or about June 22, 1988, a petition under the All Writs Act, 28 USC 1651, for an order recalling the judgment in Case No 86CV-40192-FL denying petitioner's petition for a writ of habeas corpus and then for re-entry of the same judgment denying petitioner's petition for a writ of habeas corpus so that petitioner could file an appeal as a matter of right in timely manner from the said judgment. All this in the district court.

The district court; the Honorable Stewart A. Newblatt, presiding, without any hearing whatsoever

on said petition, issued an Order under date June 28, 1988 denying said petition on the basis that '[t]here is no authority for such an action, and there is no basis to grant the request'.

On July 12, 1988, petitioner filed his Notice of Appeal from the Order of the district court denying the petition for recall of judgment.

Without oral argument, the United States Court of Appeals for the Sixth Circuit by Order dated July 27, 1989 affirmed the district court's 'judgment'.

Petitioner's motion for rehearing and suggestion for rehearing en banc was denied by the Court of Appeals by Order dated October 4, 1989.

REASONS FOR GRANTING THE WRIT

When petitioner filed his petition for a writ of habeas corpus in the district court, he proceeded to do so *pro se* because he was without money to hire a lawyer to assist him. Petitioner wrote to the district court and requested that the petition form which was available to state prisoners who wanted to proceed *pro se* be mailed to him. When he received this form, petitioner filled it out and together with an IN FORMA PAUPERIS DECLARATION mailed it to the district court.

There was no hearing on the petition for habeas corpus in the district court; the merits of the petition were decided on the papers filed by the parties according to the common practice in such matters. Petitioner learned of the court's disposition of his petition when he received in the mail a copy of Judge Newblatt's Memorandum Opinion and Order and a copy of the

Judgment entered in the case in the district court denying his petition.

Petitioner's position here is quite simple and straightforward. At the time the district court denied petitioner's petition for a writ of habeas corpus, petitioner was proceeding in *pro per* without a lawyer and in complete ignorance of the intricacies of federal appellate law and procedures. At the time the Judgment was entered, petitioner did not know that he had a right to appeal from the Judgment to the United States Court of Appeals for the Sixth Circuit. If petitioner had known at the time that he had such right of appeal, he most assuredly would have filed an appeal in timely manner.

Petitioner respectfully maintains that in the circumstances of the case as then known to the district court, the district court judge was under obligation and duty to inform and advise petitioner at the time the district court entered the Judgment denying his petition for a writ of habeas corpus that petitioner had a right to appeal from said Judgment and that if petitioner did not have the resources to meet the costs of appeal, petitioner could move the district court to proceed in *forma pauperis*.

Petitioner has long lost his right to appeal from the Judgment denying his petition for a writ of habeas corpus. Petitioner at the present time has no other remedies open and available to him. Petitioner desires to have the United States Court of Appeals for the Sixth Circuit hear on appeal the issues raised by petitioner in his petition for a writ of habeas corpus. The district court has the power and authority under 28 USC 1651 to withdraw its Judgment in the habeas corpus matter and to re-enter the same Judgment under

current date and petitioner will have a fresh 30 days in which to file an appeal as of right from the denial of his petition for habeas corpus.

I

It is provided in *Rule 32(a)(2), Federal Rules of Criminal Procedure*, that

> 'After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. . . .'

This affirmative duty is mandated in all cases, those in which the defendant has counsel and in those cases in which the defendant does not have counsel. The reason for this is given in the Notes of Advisory Committee: '[S]ituations arise in which a defendant represented by counsel at the trial is not adequately advised by such counsel of his right to appeal' *West, Federal Crim Code and Rules (1987)*, p104.

Technically, a case involving a petition for a writ of habeas corpus under *28 USC 2254* is a 'civil' proceeding; however, '[i]n the ordinary civil case, the "stakes" are generally property' whereas in a habeas proceeding, 'it is a man's liberty at stake' and, therefore, the standards of notice prevailing in a criminal case 'should be applied here in spite of the technically "civil" nature of this case', *Karstetter* v *Cardwell*, 399 F Supp 1298, 1300 (USDC D Ariz 1975).

In short, petitioner is respectfully suggesting that in the case at bench, the district court, at the time it

issued its Memorandum Opinion and Judgment denying petitioner's petition for habeas corpus, should also have issued a notice to petitioner that he had a right to appeal from the judgment of the court to the United States Court of Appeals for the Sixth Circuit and that if petitioner was unable to pay the cost of an appeal, he had the right to apply for leave to appeal in *forma pauperis*.

Surely, the right of a petitioner in a 2254 case to appeal from an adverse judgment is not of lesser importance to him than is the right he has in a criminal prosecution to appeal from an adverse judgment. Implicit in *Rule 32(a)(2), FRCrP* is the realization that a defendant who appears for sentence without counsel probably is so deficient in knowledge of the law and of his rights in the premises to appeal that it is necessary to require the sentencing judge to inform the defendant of his right to appeal and of his right to petition to proceed in *forma pauperis* if he is indigent. There is nothing inherent in a 2254 proceeding that would lead one to infer or believe that a petitioner who is proceeding *pro se* has sufficient knowledge of the law to realize that he has a right to appeal from a judgment denying his petition for a writ of habeas corpus and that he has a right to petition the court to proceed in *forma pauperis* because of indigency.

Thus, in accordance with the principles laid down in *Johnson* v *Zerbst*, 304 US 458 (1938), it should be held that unless a *pro se* petitioner for habeas corpus has been informed by the district judge of his right to appeal from a denial of his petition, he should not be deemed to have waived such right to appeal by inaction. And a rule should be promulgated requiring the

district judge in all habeas corpus cases where the petitioner is proceeding *pro se* to inform the petitioner in a separate document accompanying the judgment or order denying the writ that the petitioner has a right to appeal from the adverse judgment.

Petitioner respectfully suggests that the foregoing principle has already cast its shadow before it as it strides onto the federal jurisprudential stage. Thus, in *Campos* v *LeFevre*, 825 F2d 671, 676 (CA2 1987), a 2254 case, the Court said:

> '[F]ollowing the lead of the Eighth Circuit in Campbell v. White, 721 F.2d at 647, we direct that the district court clerks' offices screen notices of appeal for timeliness and advise pro se litigants of the appropriateness of an extension motion. We further direct that district court clerks prepare a notice to be given all litigants, whether or not pro se and whether they are plaintiffs or defendants, at the time when judgment is entered. *This notice is to inform the litigants of the time limitations for filing a notice of appeal under Fed. R. App. P. 4 and of the necessity of filing a timely motion for extension within the thirty-day extension period if the notice of appeal is untimely.*' [emphasis added]

And in *Archer* v *Lynaugh*, 821 F2d 1094, 1095 (CA5 1987), another 2254 case, the Court said:

> 'We suggest, however, that, in the future, district courts take steps to advise persons acting pro se of the requirements of Rules 4(a)(1) and 4(a)(4).'

In *United States ex rel Leonard* v *O'Leary*, 788 F2d 1238, 1240 (CA7 1986), another 2254 proceeding

where the *pro se* petitioner lost his right to appeal by filing his notice of appeal in untimely manner and by failing to file for an extension of time in timely manner, the Court said:

> 'To avoid such a harsh result in the future, the district court should advise a would-be appellant, and particularly one who is *pro se*, that his notice of appeal is untimely and further advise *pro se* litigants of the availability of a motion for an extension of time.'

To like effect, see: *Myers* v *Stephenson*, 781 F2d 1036, 1038 (CA4 1986); *Mayfield* v *United States Parole Comm*, 647 F2d 1053, 1055 n5 (CA10 1981).

II

Unless a litigant file his notice of appeal within the time constraints of *Federal Rules of Appellate Procedure 4(a)(1)* and *4(a)(5)*, he loses his right to appeal because the provisions of these Rules create 'a mandatory precondition to the exercise of jurisdiction' and '[m]andatory preconditions to the exercise of jurisdiction are often spoken of as jurisdictional [ ] in the sense that absent compliance, the court cannot acquire jurisdiction of the cause, though otherwise it is a case within the court's subject matter jurisdiction', *Mann* v *Lynaugh*, 840 F2d 1194, 1197 (CA5 1988).

And, after the expiration of the time periods prescribed by the Rules cited, 'there is nothing that either a district court or a court of appeals can do to extend the time for filing a notice of appeal', *United States* v *Cheek*, 761 F2d 461, 462 (CA8 1985).

Thus, petitioner has lost his right to appeal from the judgment of November 21, 1986, which denied his petition for a writ of habeas corpus.

But, it is the position of petitioner that under the All Writs Act [*28 USC 1651*] and *Rule 60, Federal Rules of Civil Procedure*, this Court has the power and authority to relieve petitioner from his default to timely appeal in view of the failure of the district court to advise petitioner of his right to appeal by directing the district court to recall its judgment of November 21, 1986 and then to re-enter it under current date so that petitioner will have a fresh 30 days in which to file his notice of appeal.

28 USC 1651 is commonly called the All Writs Act and it provides as follows:

> 'The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law'.

Rule 60, Federal Rules of Civil Procedure provides for and prescribes procedures to accord a litigant relief from judgments and orders of a court. The Rule specifically provides for the abolition of writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of bills of review, and the Rule provides that 'the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action'.

In *United States* v *Morgan*, 346 US 502, 506-507 (1954), the Court found that the writ of coram nobis was not authorized by any statute and that if relief

sought in the case was to be granted, it must be granted under *28 USC 1651*, and the Court found that the statute encompassed relief which could have been granted under coram nobis and since relief sought in the case could have been granted under a writ of coram nobis, the same relief could be granted under *28 USC 1651*.

Whether petitioner at bench could have obtained the relief here sought under a writ of coram nobis or a writ of audita querela or some other ancient writ now abolished perhaps need not here be decided. Petitioner believes that it is sufficient basis for the grant of the relief here sought were the Court to follow the precept laid down by the Court in *United States* v *Morgan*, *supra*, at 505:

> 'In behalf of the unfortunates, federal courts should act in doing justice if the record makes plain a right to relief.[3]'

In footnote 3, the Court quoted with approval from *Darr* v *Burford*, 339 US 200, 203-204 (1950):

> 'The writ of habeas corpus commands general recognition as the essential remedy to safeguard a citizen against imprisonment by State or Nation in violation of his constitutional rights. *To make this protection effective for unlettered prisoners without friends or funds*, federal courts have long disregarded legalistic requirements in examining applications for the writ and judged the papers by the simple statutory test of whether facts are alleged that entitle the applicant to relief.' [emphasis added]

The broad sweep of the All Writs Act was indicated by the Court in *Harris* v *Nelson*, 394 US 286, 299 (1969):

> '[T]he habeas corpus jurisdiction and the duty to exercise it being present, the courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity to judicial usage. Where their duties require it, this is the inescapable obligation of the courts. Their authority is expressly confirmed in the All Writs Act, 28 U.S.C. 1651.'

And the broad sweep of the Act was affirmed in *United States* v *New York Tel Co*, 434 US 159, 172-173 (1977) where, in considering the All Writs Act, the Court said:

> 'Indeed, "[u]nless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it". *Adams* v *United States ex rel McCann*, 317 U.S. 299, 273 (1942).'

And *Rule 60, Fed Rules Civil Pr* is specifically designed to allow the court to relieve a party from the operation of a judgment for the reasons enumerated in 60(b)(1) through (5) and for '(6) any other reason justifying relief from the operation of the judgment'.

Thus, petitioner respectfully urges to this Court that in the circumstances of this case wherein the petitioner lost his valuable right to appeal from the judgment denying his petition for a writ of habeas corpus because

of his ignorance of the law in circumstances where he was proceeding without assistance of counsel because of indigency and where the court knew that petitioner had no counsel to assist him and knew that petitioner was unlearned in the law, this Court should relieve petitioner from the effects of the said judgment to the extent of restoring to him his right to appeal by ordering the recall of the judgment and mandate and then the reentry of the judgment under current date. The Court is empowered to do this under both *28 USC 1651* and *Rule 60(b)*.

Something very similar was done in *Hill* v *Hawes*, 320 US 520, 523-524 (1944), a civil case, where the petitioner failed to timely file his notice of appeal because the clerk of the court had failed to notify the parties of the entry of the judgment.

In *Ordonez* v *United States*, 588 F2d 448, 449 (CA5 1979), a proceeding under 28 USC 2255, where petitioner's counsel failed to file a petition for certiorari as he had promised to do, the Court recalled its mandate and issued a new mandate so that the petitioner could timely file a petition for a writ of certiorari.

See also: *Lacaze* v *United States*, 457 F2d 1075 (CA5 1972) and *Savage* v *United States*, 483 F2d 67 (CA5 1973).

In *Williams* v *Arn*, 654 F Supp 241 (USDC ND Ohio 1987), where the attorney for petitioner under 28 USC 2254 misread the date of the entry of judgment denying the petition and thus failed to timely file a notice of appeal, the Court, invoking *Rule 60(b)(1)*, vacated its judgment and then reinstated the judgment under current date so that the petitioner might file a timely

notice of appeal. The Court observed that the courts in the following cases invoked *Rule 60(b)* to revive a lost right to appeal: *Wallace* v *McManus*, 776 F2d 915 (CA10 1985); *Spika* v *Village of Lombard*, 763 F2d 282 (CA7 1985); *Wilson* v *Atwood Group*, 725 F2d 255 (en banc) (CA5 1984); *Hensely* v *Chesapeake & Ohio Ry*, 651 F2d 226 (CA4 1981); *Buckey Cellulose Corp* v *Braggs Electric Construction Co*, 569 F2d 1036 (CA8 1978); *Mizell* v *Attorney General of New York*, 586 F2D 942 (CA2 1978).

RELIEF SOUGHT

Petitioner respectfully prays that this Court issue its Writ of Certiorari to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

By: /s/ CARL ZIEMBA
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Attorney for Petitioner

Dated: November 30, 1989

APPENDIX

ORDER

(United States Court of Appeals — Sixth Circuit)

(Filed July 27, 1989)

(LEDURA WATKINS, Petitioner-Appellant, v DALE FOLTZ, Respondent-Appellee — No. 88-1739)

BEFORE: MERRITT and NELSON, Circuit Judges; and BROWN, Senior Circuit Judge.

LeDura Watkins moved to proceed without a certificate of probable cause on appeal from the district court's judgment dismissing his action filed under 28 U.S.C. § 1651. The appeal has been referred to a panel pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the certified record and the appellant's brief, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Watkins, seeking an unspecified writ, petitioned the district court to change the entry date on its judgment dismissing his habeas corpus petition to allow him to file a timely appeal.

The district court denied the petition concluding that it lacked authority to grant the requested relief.

Upon consideration, we deny the motion to proceed without a certificate of probable cause as moot because the motion was granted by the district court. We also affirm the district court's judgment for the reasons stated by it. Watkins failed to assert any basis for relief under § 1651 and to the extent that the action is construed as a petition for a writ of mandamus, relief is not warranted because Watkins failed to make the required demonstration that he has a clear and indisputable right

to relief. *See In re Post-Newsweek Stations, Mich., Inc.*, 722 F.2d 325, 329 (6th Cir. 1983).

Accordingly, the motion to proceed without a certificate of probable cause is denied as moot and the district court's judgment is hereby affirmed. Rule 9(b)(5), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Clerk

ISSUED AS MANDATE: October 12, 1989
COSTS: NONE

(Certification Omitted)

ORDER

(United States Court of Appeals — Sixth Circuit)

(Filed October 4, 1989)

(LEDURA WATKINS, Petitioner-Appellant, v DALE FOLTZ, Respondent-Appellee — No. 88-1739)

BEFORE: MERRITT, Chief Judge, NELSON, Circuit Judge, and BROWN, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Clerk

ORDER DENYING "RECALL OF JUDGMENT"

(United States District Court —
Eastern District of Michigan — Southern Division–Flint)

(Filed June 30, 1988

(LEDURA WATKINS, Plaintiff, v. DALE FOLTZ, Defendant — CIVIL ACTION NO: 86-CV-40192-FL)

Defendant has filed a Motion-Petition "For Order Recalling Judgment to Allow Taking an Appeal." He wants the Court to vacate the earlier judgment and then re-enter the same so that a timely appeal could be filed from the re-entered judgment. He seeks this because he did not timely appeal from the earlier judgment.

There is no authority for such an action, and there is no basis to grant the request.*

Thus, the Motion is DENIED.

SO ORDERED.

/s/ STEWART A. NEWBLATT [6-28-88]
United States District Judge

Dated: 6/28/88

* The only basis asserted was that defendant-petitioner, not being an attorney and not knowing of his appellate rights, failed to timely appeal. This is not sufficient.